IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

SUMMONS FOR JUDGMENT NO.602 OF 2005

IN

SUMMARY SUIT NO. 3656 OF 2004

RMC Readymix (I) P.ltd ....Plffs
vs.
Kanayo Khubchand Motwani ...Defnd

A.Y. Bookwala, Sr. Adv with Pandya Gandhi & Co.
for the plaintiffs.
D.J. Khambatta, Sr. Adv. with N. Engineer
i/by. Fedral and Rashmikant
for the defendants.

CORAM: S.U. KAMDAR, J.

DATED: 21ST MARCH, 2006.

ORAL JUDGMENT :

1. The present suit is filed for the recovery of sum of Rs.85,26,667/- comprising of the principal amount of Rs.50 lacs towards the security deposit and the sum of Rs.35,26,667/- towards interest at the rate of 24% p.a. on the said security deposit. Some of the material facts

of the present case are as under :

2. Pursuant to a leave and licence agreement executed on 23.11.98 the defendant granted to the plaintiffs a licence inrespect of a commercial premises admeasuring 7500 sq.ft being super built up area situated on the first floor of the building known as ‘Dakshana’ which is situated at Plot no.2., CBD, Belapur, New Mumbai. The said area was given on licence alongwith 10 car parking space in the compound of the said building. Some of the relevant clause of the said leave and licence agreement are as under :

> 14(a) The Licensee shall pay to the Licensor a sum of Rs.50,00,000/- (Rs. Fifty Lacs) as and by way of refundable security deposit. The said amount of deposit shall not carry interest.
>
> (b) The deposit will be returned by the licensor to the licensee at the end of the licence period against vacant possession of the premises being handed back by the Licensee to the Licensor.
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> (c) In the event of Licensee defaulting in handing back to the Licensor vacant possession of the premises at the end of the contract period of three years, the Licensor shall be entitled without

prejudice to its other rights and remedies, to forfeit the said amount of deposit and also to sue for vacant possession.

15(a) The Licensee shall, at least one calendar month before the expiry of the aforesaid licence period of three years, (hereinafter referred to as "the Due Date") give intimating in writing to the Licensor that the Licensee will be handing back to the Licensor on the Due date, the licensed premises, together with the aforesaid car parking spaces, in accordance with the provisions of clause (13) of this Agreement :

(b) Thereafter the Licensor shall furnish to the Licensee, atleast four days prior to the due date a Xerox copy of a Bank’s pay order (to be obtained by the Licensor drawn in favour of the Licensee) for the said amount of the refundable deposit, namely, Rs.50,00,000/- (fifty Lacs), evidencing the readiness and willingness of the Licensor to refund to the Licensee the said security deposit simultaneously with and against the licensee handing back to the Licensor the licensed premises and the said car parking spaces in accordance with he provisions of Clause (13) above.

(c) If the Licensee fails to hand back to the Licensor the licensed premises alongwith the said car-parking spaces on the due date against tender by the Licensor to the Licensee of such Bank’s Pay-Order for Rs.50,00,000/- (Rs. Fifty Lacs), the licensee shall be considered to be in default.

(d) If, on the other hand, the Licensor fails to furnish to the Licensee

a xerox copy of the Bank's pay order for Rs.50,00,000/- (Rs. Fifty lacs) referred to above and fails to hand over to the Licensee such Pay-order for Rs.50,00,000/- (Rs. fifty Lacs) simultaneously with and against the Licensee tendering to and offering to hand back to the Licensor the licensed premises together with the car-parking spaces, on the due date, the licensor shall be considered to be in default and the consequences specified in Clause (16) hereunder shall become operative.

16. If the the Licensor is in default as envisaged in Clause (15)(d) above, then and only in such event, the undermentioned consequences shall follow:-

(a) The Licensee shall be entitled to retain with itself the licensed premises and the car-parking spaces until the time the Licensor refunds to the Licensee the aforesaid security deposit of Rs.50,00,000/- (Rs. Fifty Lacs)with interest thereon at the rate of 24% per annum from the Due Date till the date of such refund.

(b) For the duration specified in sub-clause (a) above, the Licensee shall not be liable to pay any licence fee/compensation mesne profits or any other charges whatsoever inrespect of the licensed premises and/or the car-parking spaces:

(c) At any time after the due date, whenever the Licensor is ready and willing to refund and tenders to the Licensee the said amount of security deposit namely, Rs.50,00,000/- (Rs. Fifty Lacs) with interest thereon at the rate of 24% p.a. as specified in sub-clause (a) above, the

> Licensee shall, against tender by the Licensor of the said amount of security deposit namely, Rs.50,00,000/- and interest as aforesaid, by an Bank's Pay-order in the name of the Licensee obtained by the Licensor, the Licensee shall hand back to the Licensor the licensed premises together with the car-parking spaces. The Licensor shall be required to give to the Licensee at least three months' notice in writing of the intended tender.

3. Under the aforesaid terms and conditions it is inter-alia provided that the licence will be given to the plaintiffs on their depositing of Rs.50 lacs as and way of refundable security deposit without any interest. Under Clause 14(c) it was provided that the said deposit will be returned to the defendant on their handing over vacant possession of the said premises back to the plaintiff. Clause 15(a) and (b) provides for a notice period and it is inter-alia provided that one calendar month notice will be given before the expiry of the licence period for handing back possession of the said premises. The licence period was for three years with effect from 20.11.1998. Thus the licence has expired on

21.11.2001. The modality of handing back the possession of the premises is also provided under the terms and conditions of the said agreement. Clause 16(c) inter alia provides that the plaintiffs shall be entitled to retain possession of the said premises alongwith the car parking space till and until the defendant refunds to the plaintiffs the said security deposit of Rs.50 lacs with interest from the due date till the actual date of the refund of the said amount. Under Clause 15(d) of the said licence agreement it was provided that the defendant will be entitled to return the possession of the said premises only after the defendant provides a zerox copy of the bank pay order for Rs.50 lacs to the plaintiffs and only on receipt of the xerox copy of the pay order the plaintiffs will be liable to return the possession of the premises simultaneously with the receipt of the regular demand draft in accordance with the xerox copy thereof.

4. Before the licence period expired on 22.11.2001 the plaintiffs issued a letter on

26.9.2001 to the defendant inter-alia informing him that they will be handing back the possession of the said premises with the car parking space on the due date in accordance with the licence agreement. On 5.10.2001 once again the plaintiffs addressed a letter to the defendant recording therein the meeting of the parties held on 26.9.2001. It was recorded therein that the defendant is not willing to refund the amount of Rs.50 lacs because there are tight market conditions. The defendant has offered to continue the said arrangement for further three years period. However plaintiffs in the said letter have rejected the said offer and has demanded that the money should be refunded and possession of the premises be taken back. Inspite of the aforesaid the defendant did not refund the said amount. On 9.1.2002 the plaintiffs issued a credit note claiming interest on Rs.50 lacs at the rate of 24% p.a. for the period 22.11.2001 to 31.12.2001 amounting to Rs.1,26,667/-. Thereafter on 19.1.2002 the defendant wrote a letter inter-alia recording therein that in the month of August 2001

there was a meeting and there were discussions for continuation of the licence agreement but the rent per month could not be fixed. On 25.1.2001 the plaintiffs once again called upon the defendant to return the said sum of Rs.50 lacs failing which the plaintiffs will claim the interest. The plaintiffs also asked for an enforcement of the notice period under Clause 16(c) of the said Act. Inspite of the aforesaid since they never returned the amount the premises were kept in possession by the plaintiffs and the plaintiffs have filed the present suit for the recovery of the said security deposit of Rs.50 lacs with interest thereon of Rs.35,26,667/- totalling to Rs.85,26,667/-.

5. Learned counsel appearing for the plaintiffs has contended that all throughout right from 26.9.2001 the plaintiffs have repeatedly asked the defendant to take back the possession of the said premises and refund the amount of security deposit of Rs.50 lacs. However the defendant has been negligent to refund the said amount of Rs.50 lacs. The plaintiffs states that

the plaintiffs were always and even today ready and willing to return the said premises to the defendant on the defendant making payment of the suit claim in the present case.

6. Learned counsel for the defendant has on the other hand contended that the amount of Rs.50 lacs has been forfeited by the defendant because the defendant did not vacate the possession of the premises inspite of demanding the same by a letter dated 19.1.2002. It has been contended by the learned counsel for the defendant that inresponse to the letter dated 19.1.2002 the plaintiffs have sent a letter on 25.1.2002 and have demanded a notice period of three months under Clause 16(c). It has been contended by the learned counsel for the defendant that in view of the said letter it is expressely clear that the plaintiffs were not ready and willing to hand over possession of the said premises and thus the defendant is entitled to forfeit the cash amount of security deposit as contemplated under the leave and licence agreement. Learned counsel for the defendant has

alternatively further contended that an oral arrangement was arrived between the plaintiffs and the defendant in the month of August 2001 under which it was agreed that the plaintiffs will continue to use, occupy and possess the premises on the same terms and conditions and continue to pay the rent as provided under the leave and licence agreement to the defendant. It has been thus contended that the defendant is entitled to adjust the said security deposit of Rs. 50 lacs inrespect of use, occupation and possession of the premises by the plaintiffs subsequent to 22.11.2001 and thus nothing is due and payable by the defendant to the plaintiffs herein.

7. Learned counsel for the defendant has thereafter contended that this court has no jurisdiction to entertain and try the present suit because the suit is not maintainable as a summary suit under Order 37 Rule 2 of the CPC in view of the fact that the premises are lying in possession of the plaintiffs and until the premises is returned back the defendant is not entitled to the

recovery of the security deposit and thus the Summons for Judgment is liable to be dismissed. Lastly the learned counsel has contended that his court has no jurisdiction to entertain and try the suit in view of the provisions of S.41 of the Presidency Small Cause Courts Act 1982 and exclusive jurisdiction is vested in the Small Cause Court at Bombay. In support of the aforesaid contention the learned counsel for the defendant has placed reliance on the judgment of the apex court in the case of **Mansukhlal Dhanraj Jain and Ors. vs. Eknath Vithal Ogale reported in AIR 1995 SC 1102.** It has been contended by the learned counsel for the defendant that the present suit is relating to "the recovery of possession" and therefore the suit is liable to be dismissed for want of jurisdiction as only the Small Cause court alone has jurisdiction to entertain and try the suit between the licensor and the licensee inrespect of the suit relating to "recovery of possession".

8. I have considered the aforesaid contention

of the learned counsel for the defendant at length. In so far as the jurisdiction issue is concerned I am of the opinion that the contention has no merits. The Provisions of Section 41 of The Presidency Small Cause Courts Act, 1882 reads as under :

> **"41. Suits or proceedings between licensors and licensees or landlords and tenants for recovery of possession of immovable property and licence fees or rent, except to those to which other Acts apply to lie in Small Cause Court.-**
>
> (1) Notwithstanding anything contained elsewhere in this Act but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefore, irrespective of the value of the subject matter of such suits or proceedings.
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> (2) Nothing contained in sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of licence fee or charges of rent thereof to which

> the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Municipal Corporation Act, [the Maharashtra Housing and Area Development Act, 1976, or any other law for the time being in force, apply.]

9. The said provision of Section 41 only applies in cases where the suit is related to "recovery of possession" of premises or for demand of compensation under the leave and licence agreement. The present suit is for refund of security deposit paid under the licence agreement with interest thereon. The said suit for refund of security deposit is in my opinion not covered by the provisions of Section 41 of the Presidency Small Causes Court Act. It is not possible to accept the contention of the learned counsel for the defendant that the suit for recovery of security deposit relates to recovery of possession of the licensed premises. The judgment of the apex court in the case of Mansukhlal Dhanraj Jain (supra) is interpreting the words "relating to recovery of possession" and it is held that these

words are wide enough to cover all kinds of suit which pertains to possession of the suit premises. In my opinion the aforesaid judgment has no application on the fact of the present case because this suit is purely a money suit and is inrespect of refund of the security deposit. Such monetary claims for refund of security deposit are not covered by the word "relating to recovery of possession". It is because even for the recovery of possession the section itself provides specifically that the suit will lie under Section 41 of the Presidency Small Cause Courts Act. In the present case the suit is also not for recovery of compensation amount but it only pertains to refund of security deposit. Thus in my opinion the contention advanced by the learned counsel for the defendant that this court has no jurisdiction to entertain and try the suit in the light of the provisions of Section 41(1) of the Presidency Small Cause Courts Act, 1882 has no merits and the same is required to be rejected.

10. Turning to the next technical defence which is raised that the suit is not maintainable under Order 37 Rule 2 of the CPC by virtue of the fact that the possession of the premises is still with the plaintiffs I am of the opinion that in the light of my judgment in the case of **Polaroid India P.ltd vs. Nav Nirman Co.and Ors. reported in 2006(1)Bom.C.R. 252** the said contention cannot be accepted. I am informed by both the parties that an appeal arising from the said order has been dismissed by the Division Bench of this court. In the said judgment I have inter-alia held that the suit is maintainable for the recovery of security deposit and the possession of the premises can be simultaneously handed over by the plaintiffs to this court who will in turn hand over to the defendant, if the defendant accepts the claim of the plaintiffs in the present suit. In the light of the aforesaid judgment I do not find any merits in the contention that the suit is not maintainable under Order 37 Rule 2 of the CPC and thus I reject the same.

11. Now turning to the merits of the case namely that the contention of the defendant that the defendant has confiscated the entire amount of Rs.50 lacs by virtue of the default on the part of the plaintiffs in not handing over the said premises to the defendant is concerned the said contention is absolutely baseless and without any merits. I am of the view that the reliance placed on letter dated 25.1.2002 is without any substance. There are letters after letters by which the plaintiffs have asked the defendant to take back the possession of the premises from them. The letter is dated 26.9.2001 and reminder is of 5.10.2001 and ultimately even the interest is claimed due to non-refund of security deposit by a letter dated 9.1.2001. It is only thereafter that the defendant in place of refunding the amount in accordance with Clause 15 and 16 of the agreement by forwarding the Xerox copy of the demand draft of Rs.15 lacs a false contention has been put up that there is an oral agreement to continue the leave and licence agreement. In that light of the matter the plaintiffs have claimed

that they should be given a three month notice under Clause 16(c) of the said contract. I do not find any merits that by virtue of the demand of notice in the said letter the plaintiffs have in any manner committed default in handing over possession of the premises to the defendant so as to entitle them to forfeit the said amount of Rs.50 lacs which is given as security deposit. Even inrespect of the so called oral arrangement there is no material or evidence produced inrespect of the aforesaid contention. The aforesaid contention is only supported by oral statement in affidavit-in-reply as well as in a notice letter dated 19.1.2002. The conduct on the part of the plaintiffs prior to the letter dated 19.1.2002 and even subsequent thereof has been consistent in contending that they are not interested in continuing to hold the possession of the said premises and they want to vacate against the defendant handing over the deposit amount of Rs.50 lacs. The defendant has admittedly never forwarded the xerox copy of the draft of the said amount of Rs. 50 lacs to the plaintiffs as

required under the leave and licence agreement and thus the question of handing back the possession of the said premises by the plaintiffs cannot arise. The contention advanced by the defendant is not only without evidence but the same is an after-thought. In my opinion the defence raised by the defendant is bogus and moonshine and without any substance. In view thereof I proceed to pass the following order :

(i) The defendant is granted leave to defend with condition to deposit in this court a sum of Rs.80 lacs within a period of four weeks from today.

(ii) The plaintiffs are directed hand over the keys of the said commercial premises admeasuring 7500 sq. ft being super built up area situated on the first floor of the building named as ‘Dakshana’ which is situated on Plot No.2, CBD, Belapur to the Prothonotary and Senior Master, High Court, Bombay within 7 days

from today.

(iii) The Prothonotary will keep the same in sealed envelope to the credit of the suit. The defendant will be entitled to the said keys on his deposit of Rs.80 lacs. The plaintiffs will be entitled to withdraw a sum of Rs.50 lacs from the deposit of Rs.80 lacs only if they have deposited the keys with the Prothonotary and Senior Master of the said premises.

(iv) If the amount is not deposited as directed above, the keys will be retained by the Prothonotary and Senior Master and will be handed over to the defendant only after the decree is passed and executed and the amount is so released.

(v) In an event of deposit of amount and on the plaintiffs depositing the keys and on the plaintiffs withdrawing Rs.50 lacs

as directed in Clause (iii) hereinabove the Prothonotary and Senior Master, High Court, Mumbai will invest balance Rs.30 lacs with any nationalised bank initially for a period of three years and renew the same from time to time. However in an event if the key is not deposited by the plaintiffs and the amount of Rs.80 lacs is deposited by the defendant then the said matter to be placed for direction before the court.

(vi) If the amount is deposited then the suit to be transferred to the list of commercial causes. Written statement or points of defence to be filed four weeks thereafter. Affidavits, list of documents to be filed within four weeks thereafter. Inspection within four weeks thereafter. Suit to be on board of the learned Judge taking Commercial Causes.

(vii) Summons for Judgment disposed off accordingly. No order as to costs.

. The plaintiffs are permitted to withdraw the original documents and furnish the xerox copy thereof.

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